**M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express *and* Teamsters Local Union 657 affiliated with International Brotherhood of Teamsters.** Case 16–CA–24374

November 8, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On June 16, 2006, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express, Harlingen, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily refusing to hire employees in order to avoid a successor collective-bargaining obligation.

(b) Failing and refusing to recognize and bargain with Teamsters Local 657, affiliated with the International Brotherhood of Teamsters (the Union) as the exclusive collective-bargaining representative of the employees in the following unit:

> *INCLUDED*: All delivery drivers employed by M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express at its facility at 3302 Heritage Way in Harlingen, Texas.
>
> *EXCLUDED*: All other employees, including office employees, guards, managers, and supervisors as defined in the National Labor Relations Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ernesto Aguilar, Rolando Galvan, Michael Guzman, Elizandro Martinez, Edgar Rangel, Tomas Vasquez, and Gilbert Villegas instatement to the positions for which they applied, or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges.

(b) Make whole, with interest, Ernesto Aguilar, Rolando Galvan, Michael Guzman, Elizandro Martinez, Jose Muniz, Edgar Rangel, Javier Torres, Tomas Vasquez, and Gilbert Villegas for any loss of earnings and other benefits they have suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire the above-named discriminatees and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(d) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Chairman Battista agrees with his colleagues that the Respondent violated Sec. 8(a)(3) and (1) by refusing to hire the nine named discriminatees in order to avoid a successor collective-bargaining obligation. In finding that the Respondent's refusals to hire were motivated in part by a desire to avoid a bargaining obligation, Chairman Battista relies solely on credited testimony that the Respondent's owner John Gunn, its General Manager Glynn Smith, and its Manager Anthony Soto made several statements evidencing animus to DHL's Manager Hugo Moya, Act Fast Supervisor Omar Juarez, and former Act Fast employee Margarito Garcia.

Chairman Battista further agrees with his colleagues that the Respondent violated Sec. 8(a)(5) and (1) by failing to recognize and bargain with the Union. In so doing, he notes that the Respondent did not argue that there can be no violation because the Union did not request bargaining. Thus, he does not pass on the validity of precedent arguably holding that there can be a violation even absent a union demand for bargaining. See *Smith & Johnson Construction Co.*, 324 NLRB 970, 970 (1997).

[3] We shall modify the judge's recommended Order to conform to our standard remedial language, to reflect the violations found, and to reflect that the Respondent has already hired employees Jose Muniz and Javier Torres. We shall also substitute a new notice to conform to the Order as modified.

form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at the facility in Harlingen, Texas, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or the facility involved in these proceedings has been closed, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2005.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 8, 2006

_____
Robert J. Battista, Chairman

_____
Wilma B. Liebman, Member

_____
Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminate against you by refusing to hire you to avoid a successor collective-bargaining obligation.

WE WILL NOT fail or refuse to recognize and bargain with Teamsters Local 657, affiliated with the International Brotherhood of Teamsters (the Union) as the exclusive collective-bargaining representative of the employees in the following unit:

*INCLUDED*: All delivery drivers employed by M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express at its facility at 3302 Heritage Way in Harlingen, Texas.

*EXCLUDED*: All other employees, including office employees, guards, managers, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Ernesto Aguilar, Rolando Galvan, Michael Guzman, Elizandro Martinez, Edgar Rangel, Tomas Vasquez, and Gilbert Villegas instatement to the positions for which they applied or if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges.

WE WILL make whole, with interest, Ernesto Aguilar, Rolando Galvan, Michael Guzman, Elizandro Martinez, Jose Muniz, Edgar Rangel, Javier Torres, Tomas Vasquez, and Gilbert Villegas for any loss of earnings and other benefits they have suffered as a result of the unlawful discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire the above-named discriminatees and, within 3 days thereafter, notify them in writing that we have done this and that we will not use our unlawful actions against them in any way.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

M. MOGUL ENTERPRISES, INC. D/B/A MSK CARGO/KING EXPRESS

*Jamal M. Allen, Esq.,* for the General Counsel.
*Stephen C. Key, Esq.* and *Mica Pardon, Esq.,* for the Respondent.
*Pablo V. Cruz,* for the Charging Party.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## DECISION

### STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Harlingen, Texas, on February 6 and 7, 2006, pursuant to a complaint issued by the Regional Director of Region 16 of the National Labor Relations Board (the Board) on November 30, 2005. The complaint alleges that M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express (the Respondent or MSK) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The complaint is based on charges brought by Teamsters Local Union 657 affiliated with International Brotherhood of Teamsters (the Charging Party or the Union). The complaint is joined by the answer of Respondent wherein it denies the commission of any violations of the Act.

Upon consideration of the testimony of the witnesses, the exhibits received at the hearing and the positions of the parties as contended at the hearing and as set out in their briefs, I make the following

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits and I find that at all times material herein that Respondent has been a Texas corporation and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been engaged in the pick up and delivery of packages as a contract courier service for DHL Express (DHL), that during the past 12 months, Respondent, in conducting its business operations within the State of Texas, derived gross revenues in excess of $50,000 for the transportation of freight in interstate commerce pursuant to contracts with the common carrier DHL, a nationally known entity which is directly engaged in interstate commerce and operates between the various States of the United States.

On July 5, 2005,[1] Respondent commenced operations at a DHL facility located at 3302 Heritage Way, Harlingen, Texas (the HRL Station), the only facility involved herein pursuant to a cartage agreement with DHL executed the same day. Pursuant to this agreement, Respondent picked up and delivered freight in the McAllen, Texas area. Prior to July 5, another courier service company, Act Fast Delivery of Corpus Christi, Inc. (Act Fast), provided similar courier services while operating out of the HRL Station pursuant to a cartage agreement similar in most respects to that entered into by Respondent. However, Act Fast picked up and delivered freight in the Harlingen area as well as the McAllen area.

On April 13, 2005, the Union had been certified as the exclusive collective-bargaining representative of a unit of employees of Act Fast, described as follows:

> *INCLUDED*: All delivery drivers employed by Act Fast Delivery of Corpus Christi, Inc. at its facility at 3302 Heritage Way in Harlingen, Texas.
>
> *EXCLUDED*: All other employees, including office employees, guards, managers, and supervisors as defined in the National Labor Relations Act.

A unit of Respondent's employees described in this manner constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

Upon termination of Act Fast's cartage agreement, DHL divided the area serviced out of the HRL Station into two separate areas: The Harlingen area and the McAllen area and bid them out separately. Respondent MSK was awarded the contract for the McAllen area and another courier service company (Third Garage) was awarded the contract for the Harlingen area, both of which have operated out of the HRL Station since July 5, 2005. Other than the geographical modification brought about by the separation of the McAllen and Harlingen contracts, upon commencing operations at the HRL Station, Respondent's operations were similar, in most respects, to those of Act Fast. Specifically, Respondent's employees work similar hours, under similar working conditions, driving generally similar freight along generally similar routes as compared to the employees who worked for Act Fast out of the HRL Station. Respondent concedes it is aware wages paid by Respondent are generally typical for the industry. At no time did Respondent acquire any equipment, supplies, trucks, goodwill, or any other assets or liabilities of Act Fast nor did Respondent enter into any agreements to do so, or otherwise, with Act Fast.

The following former employees and/or supervisors of Act Fast applied for jobs with Respondent:

| | |
|---|---|
| Juarez, Omar | Torres, Javier |
| Lopez, Jesus | Aguilar, Ernesto |
| Avalos, Juan | Guzman, Michael |
| Gonzalez, Guadalupe | Martinez, Elizandro |
| Lopez, Carlos | Vasquez, Tomas |
| Barrera, Jose | Rangel, Edgar |
| Sierra, Rosalinda | Muniz, Jose |
| Guerra, Ramiro | Villarreal, Roberto |
| Mata, Juan | Villegas, Gilberto |
| Ramirez, Lorenzo | Torres, Nelson |

Respondent hired the following former Act Fast employees to fill the following respective positions:

| | |
|---|---|
| Avalos, Juan | Supervisor |
| Barrera, Jose | Courier |
| Gonzalez, Guadalupe | Courier |
| Guerra, Ramiro | Courier |
| Juarez, Omar | Supervisor |
| Lopez, Carlos | Courier |
| Lopez, Jesus | Courier |
| Mata, Juan | Courier |
| Quezada, Felipe | Supervisor |
| Ramirez, Lorenzo | Courier |
| Sierra, Rosalinda | Courier |
| Muniz, Jose | Courier |
| Torres, Javier | Courier |
| Torres, Nelson | Courier |

At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors for Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

| | |
|---|---|
| John Gunn | Owner |
| Glynn Smith | General Manager |

[1] All dates are in 2005, unless otherwise stated.

## II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

This case involves the alleged refusal by a successor employer to hire the employees of the predecessor employer in order to evade the successor employer's obligation to recognize and bargain with a newly certified union by refusing to employ the work force in which a majority of the predecessor's employees had selected the Union thus giving rise to a Section 8(a)(1) and (3) violation for discriminating against the employees because of their support for the Union and a Section 8(a)(1) and (5) violation by refusing to recognize and bargain with the Union.

DHL Express (DHL) is a cartage and ground delivery service which maintains stations in a large part of the country and contracts with individual contractors who perform the cartage and delivery service for it. DHL operates a station in Harlingen, Texas, which is divided into two fleets of individual routes to perform this work. They are the Harlingen fleet which provides delivery service in the Harlingen, Texas area (HRL) and the McAllen fleet which provides delivery service in the McAllen, Texas area (MFE). Act Fast Delivery of Corpus Christi, Texas (Act Fast) contracted with DHL from March 4, 2004, to July 2, 2005, to provide cartage services at DHL's station at Harlingen, Texas. Act Fast employed approximately 28 couriers/drivers at the Harlingen station which were operated as two fleets, HRL and MFE.

The Union commenced organizing the courier/drivers employed by Act Fast at the Harlingen facility in January 2005, and the Board held an election on April 5, 2005, which the Union won by a vote of 23 to 4. On April 13, 2005, the Board certified the Union as the exclusive collective-bargaining representative of the Act Fast employees in the aforesaid appropriate unit:

> *Included*: All delivery drivers employed by the employer at its facility at 3302 Heritage Way in Harlingen, Texas.
>
> *Excluded*: All other employees, including office employees, guards, managers, and supervisors as defined in the National Labor Relations Act.

After the election, Act Fast notified DHL of its intent to terminate their agreement because they were losing money from the relationship. As noted above under their contractual relationship DHL's operations were divided into two separate operations, one for the McAllen, Texas area fleet (MFE) and one for the Harlingen, Texas area fleet (HRL). After receiving the notice of termination from Act Fast, DHL decided to solicit separate bids for the HRL and MFE operations. Respondent bid on both contracts and on or about June 9, was awarded the MFE contract. "Third Garage" another bidder was awarded the HRL contract. The HRL operation consisted of 11 routes and the MFE operation consisted of 16 to 17 routes. Act Fast had employed 17 to 18 drivers in the MFE operation. There had been several contractor changes in the past and the courier employees had undergone several transitions wherein the new contractor had met with them and hired the entire complement of employees at that time and the employees had continued to service their same assigned routes. However in the instant case the Respondent followed a different pattern. Act Fast decided to notify its supervisors of its decision to terminate the contractual relationship with DHL 2 to 3 weeks prior to the actual termination of its operations at the Harlingen facility but not to inform its courier/driver employees until the week of the termination of its operations because of a fear that the employees would quit or somehow react in a negative manner so as to interrupt service. Act Fast area manager, David Maldonado, testified he was not given a specific reason by his superiors.

General Manager and Director of Respondent's Operations Glynn Smith testified that on June 13, he had asked Facility Manager Hugo Moya if they would be able to approach the drivers but that Act Fast had told Moya they were not going to announce the transition to their employees until July 1. Sometime after this, he asked Moya if he could get him a copy of the *Excelsior* list but did not receive it. Moya requested this of Maldonado but was unable to obtain it. Act Fast Chief Operations Officer Larry Sleeper testified he denied the request to obtain a list of the employees who had voted in the election

Whereas Act Fast served between 27 to 28 routes in the combined MFE and HRL area, 11 were HRL routes and 16 to 17 were MFE routes. Act Fast employed 17 to 18 drivers to perform the work in the MFE fleet. In the past 5 years there had been four different contractors serving DHL's Harlingen facility. Accordingly most of the courier/drivers had experienced the prior changes of contractors who met with the employees and hired them all at that time with them filling out an application at or near the time of hire and the employees retained the same routes with the new contractor. As it turned out this did not happen with the assumption of the contract by MSK. Act Fast did not notify its employees of the impending termination of its contract with DHL until the final week of its operations when its Area Manager David Maldonado on Tuesday, June 28, told the employees of the loss of their jobs and told them there were applications on the counter in the front part of the facility for the new contractors. Two to 3 weeks prior to this Maldonado had notified its three supervisors of the change and told them not to disclose it to the drivers. DHL's Harlingen Station Manager Hugo Moya testified he had arranged the June 28 meeting on behalf of Third Garage Owner John Ray who wanted to talk to the drivers on behalf of Third Garage. Ray spoke to the employees after Maldonado, and told them he looked forward to working with them. Respondent declined an offer by Moya to meet with the drivers.

After receiving notification that the MFE contract had been awarded to it, MSK advertised in a local newspaper for courier positions and did not identify itself in the advertisements, which ran from Monday, June 13, through Sunday, June 19. On Saturday, June 11, Glynn Smith, Respondent's director of operations, e-mailed DHL Station Manager Moya concerning the advertisement and stated, "The ad simply asks interested applicants to come in to your station and submit an application. If you wouldn't mind, could you make a few copies and hand them out at your counter, then collect the completed packets and hold them for either me or John Gunn (one of Respondent's owners). One or both of us will be in next week to run the background and MVR (Motor Vehicle) checks and schedule interviews." Smith also sent an electronic copy of Respondent's employment application. Although Respondent's applications were placed at the front counter desk, the Act Fast employees were largely oblivious of the coming change in contractors. The employees were not normally in the front part of

the facility where the applications were placed but rather used other entrances and exits. During the week of June 13 to 17, Smith and Gunn arrived at the Harlingen facility and Smith asked Station Manager Moya for the *Excelsior* list which had been used for the union election. Moya testified he did not know what was contained in the *Excelsior* list. However he attempted to comply with the request and contacted Act Fast Area Manager Maldonado and asked for a list of the outcome of the vote including the identities of who had voted for and against the Union for Gunn. This request was forwarded to Act Fast's Regional Manager Patrick Woods and then to Act Fast's Executive Vice President and Chief Operating Officer Larry Sleeper who directed that the request should not be complied with.

Moya testified further that Gunn and Smith asked him if he knew which employees had not voted for the Union, and that he told them that brothers Jesse Lopez and Carlos Lopez had not done so. Gunn then commented he valued "company loyal employees." Moya also testified that he asked Gunn if he was going to give the employment applications to the employees and that Gunn replied, "f[uck] them" and answered in the negative and said that it was the employees' problem if they did not read the newspaper. I credit Moya's testimony as set out above. It is undisputed that the presence of Gunn and Smith during the week was open and not concealed. However, it is also undisputed that the interviews were conducted after the typical time for the unit employees to leave on their routes and that the employees did not generally return to the facility until late in the day after completion of their routes. Although the Respondent appears to have had only limited interest in contacting and retaining the unit employees, it actively recruited Act Fast's three supervisory employees including Omar Juarez, its assistant manager. Further, Juarez testified that Gunn and Smith told him to only give applications to the "new employees" who had not been there at the time of the election and not to anyone else. Following these instructions by Respondent's management, Juarez gave Respondent's applications to Act Fast employees Jose Barrera, Ramiro Guerra, Juan Jose Mata, Lorenzo Ramirez, Rosalinda Sierra, and Guadalupe Gonzales, all new employees with the exception of Lorenzo Ramirez. Juarez carried out this mission by contacting the favored employees near the end of their shifts and telling them to meet him in his office where he gave them a packet containing the applications and told them not to open it until they were home. Juarez also told the employees not to discuss this with anyone. However, Rosalinda Sierra discussed this with co-employee Edgar Rangel and Lorenzo Ramirez showed the application to the leading prounion leader at the time, Gilberto Villegas and to employee Elizandro Martinez. Juarez also gave employee applications to Supervisors Felipe Quezada and Juan Avalos and they and Juarez were employed by Respondent. As noted above the interviews of applicants who had responded to the newspaper advertisements were generally conducted following the departure of the drivers from the facility to deliver their packages. However, some of the employees became aware of the distribution of the applications by the presence of Respondent's management on the premises during the workweek commencing on June 20, and as a result of the disclosure to other employees by employees Sierra and Ramirez that they had been given the Respondent's applications. In addition Respondent began to train the employees it had hired from outside the current bargaining unit. On a Friday in June Respondent sent Juarez and Quezado to a La Quinta Inn in Harlingen, Texas, to assist in the training. In addition to the surreptitious distribution of applications to the favored new employees and those deemed "loyal" to Respondent as well as the recruitment of the supervisors, Respondent also stymied other employees' efforts to obtain an application. Driver Tomas Vasquez testified that he requested an application from Smith and was told there was not any available. He did not receive an application until June 28. Thus not only were the existing employees bypassed in the distribution of the applications but their efforts to obtain an application were rebuffed

On Tuesday, June 28, at the meeting arranged by Moya in response to Third Garage Owner John Ray who wanted to talk to the new employees, the Act Fast employees were officially notified of the change in contractors. Although Moya asked Gunn and Smith whether they wished to speak to the employees, they declined. At that meeting Act Fast Area Manager David Maldonado informed the employees that Act Fast was terminating its contract with DHL and that Respondent was taking over the MFE route and Third Garage was taking over the HRL route. Maldonado told the employees that there were applications available at the front desk. Following Maldonado's announcement, Third Garage Owner John Ray spoke and told the employees he was looking forward to working with them. Respondent's management did not attend the meeting although Gunn was present in the facility. Roland Galvin turned in his completed application on the evening of June 28. Javier Torres, Ernesto Agiular, Michael Guzman, Elizandro Martinez, and Tomas Vasquez turned in their applications on that day also. Moreover, new employee Sierra and employee Lorenzo Ramirez who had both previously received their applications from Juarez under covert circumstances, waited to turn them in until June 28. Edgar Rangel turned his application in on June 29. Jose Muniz turned his application in on June 30. Gilberto Villegas turned his application in on July 1.

Act Fast's final day of operation under the contract was July 1. As usual the Harlingen facility was closed on Sunday and also on Monday for the Fourth of July holiday. When the employees arrived at the facility at their normal starting time of 6:30 a.m. on Tuesday, July 5, they observed border patrol and airport police officers there. The employees were not allowed to enter the facility by the employee entrance near the docks but were required to use the main entrance in the front where the officers were stationed. Upon their admission to the building the employees were met by Gunn or Smith and were asked to give their names and then asked if they were transfers and then asked if they worked for Act Fast. When they answered this inquiry in the affirmative, they were told they no longer had a job. They began to picket the facility less than a week thereafter and the picket continued up to and including the day of the hearing in this case.

Respondent hired 21 drivers for the MFE operation on July 5. Eight of them had been employed by Act Fast. Six of the eight were the "new" employees to whom Juarez had covertly given the applications. Additionally, brothers Jesse and Carlos Lopez were hired as were Act Fast Manager Omar Juarez and Supervisors Felipe Quezada and Juan Avalos. As a result of the inexperience of the employees hired through the newspaper ads, it was necessary to train them on the routes. This was done at a local hotel by eight to nine managers transferred from other facilities of the Respondent during the first couple of weeks of

the takeover and on 1 day by Juarez and Supervisor Felipe Casada. General Counsel contends that Respondent's operations were less efficient than those of its predecessor Act Fast as Respondent employed 21 drivers for MFE whereas Act Fast had employed 17 to 18 drivers and that Respondent had a greater reliance on "hot shot" deliveries than Act Fast had. A "hot shot" occurs when the courier contractor is unable to deliver its freight and contracts this delivery to another courier. General Counsel also contends that Respondent experienced a great deal of employee turnover as 10 of the 21 drivers initially hired were no longer employed as of the date of the hearing. Juarez testified that many of these employees had told him they were quitting as a result of too many hours, low pay, and the stress of the job. Moreover since July 5, Respondent has had to hire 21 additional couriers, three of whom were former Act Fast employees including two of the discriminatees in this case. General Counsel contends that these employees were not hired until Respondent had exhausted every effort to obtain their replacement off the street. Respondent hired Muniz on August 4, and he was immediately sent to his former route. Prior to hiring Muniz, Respondent had attempted to fill this route with two to three employees who were not able to handle the work. Additionally, Javier Torres was hired on August 12, 2005, and Nelson Torres was hired on August 15, 2005. Javier Torres was also immediately assigned to his former route which Respondent was also unable to fill with two to three prior outside couriers.

General Counsel also contends that Respondent continues to monitor and discriminate against the former Act Fast employees. He bases this on the unrebutted testimony of former Act Fast employee Margarito Garcia who testified that in August 2005, about a month after the July 5 transition, he attempted to file an application for employment with Respondent and talked to Anthony Soto who was then Respondent's manager at the Harlingen facility. Garcia had worked on the route taken over by Third Garage. Garcia was interviewed by Soto who inquired about his previous experience. Garcia told Soto that he had worked on the HRL routes. Soto then asked him if he was one of the "guys that were outside, causing trouble" by picketing the facility. Garcia denied being involved in the picketing. Garcia testified further that Soto later told him he could not hire him because his name was "on some paper" and because of the Union. Soto also told him that he had talked to his "boss" about hiring him and his boss said no because Garcia was one of the former Act Fast drivers and that he had been instructed to watch out for them. I credit the above testimony of Garcia which was unrebutted as Soto was not called to testify. These unfair labor practices testified to by Garcia are not alleged in the complaint and are time barred by Section 10(b) of the Act. However, they are proof of Respondent's animus in this case.

Contentions of the Parties

General Counsel's Position

General Counsel contends that Respondent violated Section 8(a)(3) on July 5, by refusing to hire applicants Edgar Rangel, Jose Muniz, Javier Torres, Elizandra Martinez, Tomas Vasquez, Michael Guzman, Roland Galvon, Ernesto Aguilar, and Gilbert Villegas to avoid having to recognize and bargain with the Union. The General Counsel contends that "To effectuate this plan, Respondent covertly distributed applications to the employees known to be either antagonistic to the Union or having little affiliation with the Union; trained employees it hired off the streets at a local hotel in order to further conceal its covert hiring scheme; refused to provide an employment application to a discriminatee; and told a former Act Fast employee it would not hire him because of the Union and because his name was on a list.

The General Counsel contends that Respondent's asserted reasons for failing to hire the discriminatees are pretextual and that its allegations that it was duped by former DHL Station Manager Hugo Moya are not credible as Respondent continued to refuse to hire the discriminatees even after Moya resigned from his position as station manager. The General Counsel also contends that Respondent's failure to adhere to tradition by hiring the entire predecessor complement was clearly pretextual as it hired all of the former managers but not the former drivers.

The Board assesses refusal to hire cases in successor situations on the following basis:

> [T]here are several factors which the Board has considered in analyzing the lawfulness of the alleged successor's motive; expressions of union animus; absence of a convincing rationale for the failure to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct demonstrating a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its hiring in a manner precluding the predecessor's employees from being hired in a majority of the new owner's overall work force. [*Galloway School Lines*, 321 NLRB 1422, 1423–1424 (1996).]

The General Counsel contends that several of the factors identified by the Board in the *Galloway School Lines* case are present in the instant case as follows:

1. Respondent has animus against the Union.

In support of this factor General Counsel relies on the testimony of former DHL Station Manager Hugo Moya relating the statements of Glynn Smith and John Gunn. Moya testified that in reference to the unionized employees Gunn said, "Fuck them" and that Gunn and Smith requested that Moya identify the names of the employees who did not vote for the Union and Gunn told Moya that he appreciated, "loyal company employees" an apparent euphemism for those employees who did not align themselves with the Union. Moya, who is a third party witness with no stake in the outcome of this case, testified that the statements were made in his presence prior to hiring activity. Respondent's ongoing hostility toward the Union is also established by the unrebutted testimony of Margarito Garcia that Respondent's on site manager, Anthony Soto, interrogated him by asking if he was one of the employees causing trouble by picketing the facility. Soto also told Garcia his boss had told him to look out for the former Act Fast employees and that he could not hire him because of the Union. Respondent's failure to call Soto, a witness in its control and whose testimony would normally be presumed to favor Respondent leaves Garcia's testimony unrefuted and his testimony should be taken as true. Both Moya's and Garcia's testimony established the Respondent's hostility and animus against labor unions and/or protected concerted activity.

2. Respondent has failed to provide a convincing rationale for the failure to hire the discriminatees.

General Counsel contends that Respondent's failure to provide a convincing rationale for its failure to hire the discriminatees is in sharp contrast to multiple witnesses who testified at trial that during previous transitions from one contractor to another, the successor contractor simply hired the entire com-

plement of existing employees. Smith testified he did not hire the existing complement of employees because the station was a poor performer. However, Respondent did hire the entire Act Fast management team that was ultimately responsible for any alleged deficiencies. Moreover, Smith concedes the Harlingen station is still not profitable. The labor cost incurred as a result of employee turnover is undoubtedly a contributing factor in the unprofitable performance of the facility. Since July 5, Respondent has hired 42 drivers, 21 or 50 percent of whom are no longer employed at the facility. The credible and uncontradicted testimony of Omar Juarez establishes that most of the turnover is a direct result of the hiring of an inexperienced workforce who quit because of long hours and little pay.

3. Respondent engaged in inconsistent hiring practices or overt acts or conduct demonstrating a discriminatory motive.

The General Counsel contends that Respondent engaged in a disparate application process to exclude the unionized employees. It sought to obtain a copy of the *Excelsior* list from Act Fast. After its failure to obtain the list, it implemented a scheme to hire employees it perceived as being adverse to the Union or having little if any affiliation with the Union. It directed Juarez to covertly give applications to the "new employees" who were not employed at the time of the election. All nine of the discriminatees were employed at the time of the election but only one (Lorenzo Ramirez) of the six "new employees" to whom Juarez covertly gave an application was employed at the time of the April 5 union election. Accordingly they were not "tainted" by the union campaign. In addition Respondent hired Carlos and Jesus Lopez whom Moya had told Respondent had voted against the Union.

General Counsel also contends that as credibly testified to by Moya, Respondent displayed no interest in hiring or speaking to the remaining employees. On June 15 or 16, discriminatee Tomas Vasquez spoke to John Gunn as he was walking along the warehouse floor. Vasquez, who had learned from a friend that Act Fast had closed its operation in Houston, Texas, introduced himself to Gunn, told him he was a "strong driver" and would be more than happy to work for him. Gunn did not invite Vasquez to apply and did not reveal to Vasquez that he was the new contractor taking over the MFE route. On or about June 24, Vasquez approached Smith and asked if he had an employment application and Smith said no. Smith and Gunn's dismissive attitudes are consistent with Moya's testimony that they had no interest in meeting with the Act Fast employees. Further, Area Manager Maldonado testified that during the month of June he was present every week from Monday to Tuesday and during this time he met Gunn and that Gunn never asked him about the work performance of the employees nor did he ask to speak with the employees. Third Garage Owner John Ray did speak to HRL employees on June 28, after Maldonado spoke, whereas no one from Respondent addressed the employees despite the fact that based on the credible testimony of Edgar Rangel and Rolondo Galvan, Gunn was present at the facility on June 28. On the evening of June 28, Felipe Quezada directed Galvan to the office Respondent was using. Galvan introduced himself to several of Respondent's managers in the office and handed them his application. Discriminatee Edgar Rangel was present when Galvan handed his application in and Rangel recognized Gunn to whom Galvan handed his application. Rangel and Galvan were not selected for an interview. However Gunn met with and interviewed Lorenzo Ramirez on June 29, and Rosalinda Sierra on June 30, although they had not turned their applications in until June 28, the same day as six of the discriminatees in this case who were not chosen for an interview because they were not identified by Juarez as being "new employees."

4. Respondent conducted hiring in a manner to preclude a majority of the predecessor's employees from being hired.

General Counsel further contends that in addition to the evidence of Respondent's animus toward the Union, inconsistent hiring process and overt acts of discrimination, the evidence showed that Respondent planned and executed a discriminatory hiring scheme with the intended and actual effect of discriminating against the Act Fast employees identified as union supporters. Evidence of the scheme is supported by both the testimony of witnesses (including third party witnesses Hugo Moya and Omar Juarez) and Respondent's own records:

> General Counsel notes that under similar circumstances the Board has repeatedly held that an employer that purposely refuses to hire its predecessor's employees in order to evade having to recognize the Union violates the Act. See *Karl Kallmann d/b/a Love's Barbeque*, 245 NLRB 78 (1979) (Respondent's unlawful scheme to evade hiring predecessor employees included advertisements for positions in local newspapers and interviewing applicants at local motel); *Galloway School Lines*, 321 NLRB 1422, 1424 (1996) (New hiring process was specifically developed in response to fact that predecessor employees would be applying); *Pace Industries*, 320 NLRB 661 (1996) (High standards of pre-employment screening applied to exclude former employees from employment so as to avoid recognizing union); *Waterbury Hotel Management LLC*, 333 NLRB 484 (2001) (Respondent unlawfully refused to hire employees of predecessor employer). . . . Hiring a limited number of the Act Fast employees does not foreclose a finding that Respondent had violated the Act. See *Daufuskie Island Club & Resort*, 328 NLRB 415 (1999) (Respondent that purposely hired only 48.5% of the predecessor employees violated the Act).

The General Counsel contends that the Respondent is a successor as there is substantial continuity between the operations of the Respondent and its predecessor. Under the successorship doctrine, if a union represented the predecessor's employees who comprise a majority of the successor's work force, the union has a rebuttable presumption of majority status despite the change to a successor employer and the successor employer has an obligation to bargain with the Union. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). The presumption of majority status attaches if there is "substantial continuity" between the predecessor's business and that of the new employer, and if the new employer has hired a "substantial and representative complement" of its work force, a majority of which consists of the predecessor's employees. *Prime Service v. NLRB*, 266 F.3d 1233 (D.C. Cir. 2001). A successor employer does not have an obligation to hire any of the work force employed by the predecessor but cannot refuse to do so solely because they are union members or to avoid recognizing the union. *Howard Johnson v. Detroit Joint Board*, 417 U.S. 249 (1874), and *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972); *Ah Chu Co.*, 259 NLRB 177, 183 (1981). The refusal to hire the predecessor's employees violates Section 8(a)(5) as well as Section 8(a)(3). *Ah Chu Co.*, supra; *New Breed Leasing Corp.*, 317 NLRB 1011 (1995). Had the Respondent hired all of the employees of the predecessor, the

union would have maintained its majority status and the successor would have been obligated to recognize and bargain with the union. Therefore such employers are successors where there is both continuity of the workforce and continuity of the operations. In the instant case there is continuity of the work force as there is a presumption that the union's status would have continued. *NLRB v. Foodway of El Paso*, 496 F.2d 117 (5th Cir. 1974); *Sierra Realty*, 317 NLRB 832, 835 (1995), enf. denied 82 F.3d 494 (D.C. Cir. 1996). Where a successor engages in a discriminatory refusal to hire, the Board will infer that all former employees would have been retained absent the unlawful discrimination. See *Love's Barbeque*, supra at 82. Therefore continuity of the work force is presumed. But for the discriminatory hiring scheme, the Respondent would have hired all of the predecessor employees, including the discriminatees, thus establishing a majority for the Union. Respondent hired 21 couriers on July 5. Eight of these 21 couriers were the Lopez brothers and the 6 employees who were covertly given applications, who were formerly employed by Act Fast. Assuming Respondent hired the 9 discriminatees in addition to the 8 other Act Fast employees this would have constituted a majority of 17 out of 21 of the courier employees.

With respect to the continuity of operations the General Counsel contends there is also a substantial continuity in the business operations as Respondent utilizes the same facility as the predecessor, hired the same onsite managers, who were employed by Act Fast; and the courier drivers' jobs and routes are the same with no hiatus or disruption in the operations and Respondent has the same body of customers as the predecessor. The only difference is that whereas Act Fast employed a single bargaining unit for, both the McAllen and Harlingen routes, the routes have now been divided between Third Garage and the Respondent. However, the Board has repeatedly held that the change in the "scope" of the operations is immaterial to finding a successor. *Canteen Co.*, 317 NLRB 1052, 1069 (1995); *Bronz Health Plan*, 326 NLRB 810, 812 (1998), enfd. 203 F.3d 51 (D.C. Cir. 1999); *Lincoln Park Zoological Society*, 322 NLRB 263, 265 (1996); enfd. 116 F.3d 216 (7th Cir. 1997); *School Bus Services*, 312 NLRB 1, 1 (1993); *Al Chu Co.*, supra at 182, *NLRB v. Simon Bartelo Group*, 241 F.3d 207, 212–213 (2d Cir. 2001).

The General Counsel further contends that although the Union in this case has never made a demand for bargaining, no bargaining demand was necessary as the Respondent's failure and refusal to hire the discriminatees rendered any request for bargaining futile. *Smith and Johnson Construction Co.*, 324 NLRB 970, 970 (1997); *Triple A. Services*, 321 NLRB 873, 877 fn. 7 (1996); *Precision Industries*, 320 NLRB 661, 711 (1996).

The General Counsel's Credibility Arguments

The General Counsel contends that the testimony of Respondent's witnesses Juan Avalos, Jesus Lopez and Glynn Smith was not credible. Avalos is currently employed as a supervisor by Respondent and was formerly employed by Act Fast as a supervisor. Avalos testified that at some date in June, Hugo Moya told him "he would take care of it" in an apparent reference to the Union because the couriers were chanting "long live the Union" and "Union number one" in the warehouse. The General Counsel contends that the entire episode is not credible and shows how far Respondent will go to show there was a coercive atmosphere concerning discussions of the Union during Moya's tenure as the facility's station manager. The General Counsel also contends that Avalos' testimony that he had no prior knowledge that Act Fast was terminating its contract with DHL is not credible as neither David Maldonado nor Act Fast has anything to lose in this case. Moreover Avalos' employment application date is June 17, and the other Act Fast supervisors' applications are dated just 1 day prior.

With respect to the credibility of Jesus Lopez who testified he had not spoken to any of his former managers or supervisors about his nonsupport of the Union while employed by Act Fast, and specifically denied telling Maldonado that he was not a union supporter, Maldonado and Moya both credibly testified that Lopez told them of his nonsupport of the Union. Maldonado testified Lopez "stated to me several times that he didn't want to be in the union . . . he didn't feel that he should vote if he didn't want to." The General Counsel also noted that Lopez is the highest compensated driver in Respondent's employ at the Harlingen, Texas facility. The General Counsel further notes that Lopez has been involved in personal confrontations "whether real or imagined" with the Union and its supporters. In one instance a letter was placed in his van while he was employed by Act Fast which stated, "join the union bitch, or we will fuck you up." In a more recent instance while he was employed by Respondent, Lopez testified he was threatened by a union supporter at a gas station. The General Counsel contends that the foregoing "could certainly provide the incentive behind his attempt to deny his well-known opposition to the Union and color his testimony."

With respect to Respondent's General Manager Glynn Smith, the General Counsel contends that his testimony conflicts with Respondent's previous assertions to the Region and also with its own documentary evidence. Smith was present in the courtroom during the hearing as Respondent's designated representative as a motion for sequestration of the witnesses had been granted. In its statement of position filed with the Region, Respondent stated, "Both Omar Juarez and Felipe Quezada categorically deny that they covertly distributed any applications to any Act Fast employees and [Respondent] has no reason to doubt their veracity." At the hearing Smith asserted in his testimony that he had only at the hearing, learned that Moya and Juarez had conceived and implemented a plan to covertly distribute employment applications to "new employees." At the time of the trial Juarez was no longer employed by Respondent and Smith then asserted that Juarez *did* covertly distribute applications but without any instructions from Respondent to do so. This assertion by Smith in his testimony was made after the credible testimony of Juarez, Moya, Lorenzo Ramirez, and Rosalinda Sierra. In its statement of position Respondent asserted, "The Union's allegation of covert distribution is simply not credible. Between June 13 and June 25, ten former Act Fast employees had submitted applications for employment with King [Respondent]." Respondent further stated in its position statement, that all of the former Act Fast employees who applied when there was a job opening were hired. Respondent asserts in its position statement that "By this time (June 26), Smith had 23 qualified applicants, all with suitable delivery experience and successful background checks, who had agreed to terms and conditions of employment offered by [Respondent]. Thus [Respondent] discontinued the application process . . . all 10 of the Act Fast employees who had submitted applications by that date were extended an offer." During the investigation of this case, Respondent alleged that Smith had made hiring decisions on all 10 of the former

Act Fast employees who were hired on or before June 26, because they had submitted applications prior to June 26. These 10 individuals had employment applications dated from June 16 to 25. In contrast, the discriminatees' employment applications were dated on or after June 28. In support of this position, Respondent created Respondent's Exhibit 14 which lists the employment applications submitted by the former Act Fast employees in chronological order. The applications received prior to June 28, are shaded in gray and a box next to those names states in bold red ink, "June 26, 2005 All Positions Filled." However at trial Smith heard the testimony of two of the Act Fast employees initially hired by Respondent, Lorenzo Ramirez and Rosalinda Sierra that although their employment applications were dated June 24 and 25, that they did not turn them in until the following week on June 28, the same date most of the discriminates submitted their employment applications. When Smith realized this testimony was credible, he changed Respondent's position and testified that after the week of June 20, Moya called him and told him he had a few drivers who would make a good fit for Respondent. General Counsel contends this is nothing more than a poor attempt to once again shift the blame for Respondent's unlawful conduct to Hugo Moya and was not asserted during the investigation or in the position statement filed by Respondent.

Respondent's Position

The Respondent did not address or appear to contest any of the above maxims with respect to the bargaining obligations and any successorship issues but appears to concede the above-applicable principles discussed by the General Counsel in his brief. Rather it bases its defense on the credibility of its witnesses and alleged lack of credibility of the General Counsel's witnesses as discussed hereafter. In its brief Respondent asserts as uncontroverted, the following chronology of events:

In late May 2005, MSK learned that another DHL contractor, Act Fast, was terminating its contract at the DHL Station in Harlingen, Texas (the HRL Station) and that DHL intended to divide the contract and bid the area out as two separate contracts, one covering the McAllen area and one covering the Harlingen area. MSK's General Manager Glynn Smith was familiar with the HRL Station from his former employment as a district manager for DHL and knew it was a historically poor performing station. When he looked into it further, he found the station was still performing poorly and had a staggering turnover rate. He found that four separate contractors had only survived an average of 14 months over the past 5 years. However MSK had developed a reputation in the industry for turning problem areas into successful profitable contracts. On June 9, DHL awarded MSK the contract for the McAllen area to commerce on July 5. Smith testified he believed the problem was with the culture of the drivers rather than the contractors and intended to replace all of the work force. On June 10, Smith ordered an advertisement to run in a local newspaper for "experienced, full time couriers in the Harlingen/McAllen area," as was his practice for new contracts. The next day he sent an e-mail to DHL Manager Hugo Moya notifying him of the placement of the advertisement soliciting applicants to pick up applications at the HRL Station. He said he would send a copy of the application packet to Moya and asked if he "would mind mak[ing] a few copies and hand[ing] them out at your counter." Moya answered the e-mail on June 13, that he would be happy to do so. Later on the same day Smith telephoned Moya to confirm that he had received MSK's application form and to request that Moya express deliver the completed applications to MSK's office in Dallas. At that time he also asked Moya when Smith would be able to speak to the drivers employed by Act Fast. Moya called him back and said that because of a concern about service interruptions, Act Fast did not intend to notify its drivers until July 1, and that Smith would not be permitted access to the drivers until then. Smith also testified that Moya told him that word had gotten out and that some Act Fast drivers had asked for applications and asked Smith what he should tell them. Smith testified he told Moya to give applications to anyone who asked.

MSK contends in its brief that Moya initially denied this in his direct testimony but later admitted on cross-examination that this conversation took place and that Act Fast had told Moya not to allow new contractors to interview their employees until after June 28. However, after being confronted with his affidavit Moya admitted that this conversation took place and that he was specifically instructed by Act Fast not to allow the new contractors to interview their employees until after June 28. However, in other testimony Moya stated that he called Act Fast to ask them to tell their employees a new contractor was coming and that Act Fast said "no." Act Fast Manager David Maldonado repeatedly testified that Act Fast "had a large concern about our employees knowing we were leaving" and that he specifically told his supervisors to keep it a secret and that allowing the new contractor to interview the Act Fast drivers would have the same disruptive effect that Act Fast was concerned about. Act Fast Executive Vice President Larry Sleeper, after denying he had denied access to his employees, testified he told Maldonado, "if they want [a list of our drivers], they can get it from DHL, like we got it from." Moreover 10 former Act Fast employees who were called to the stand, testified that they were unaware that Act Fast was leaving until Maldonado announced it on June 28, although over 100 applicants had visited the station to fill out applications during the week of June 13, and at least 35 applicants visited the station for job interviews on June 20–21, and each of the new contractors walked freely about the docks when the drivers were present even on occasion, shaking their hands.

MSK began receiving completed applications from Moya on June 14, and began sorting through them, excluding those without courier experience and conducting background checks on desirable candidates and by the end of that first week, MSK had approximately 35 suitable candidates and scheduled interviews with those candidates on the following Monday and Tuesday, June 20–21. During the week of June 13–19, six Act Fast employees completed applications: Omar Juarez, Jesus "Jessie" Lopez, Felipe Quezada, Juan Avalos, Guadalupe Gonzales, and Carlos Lopez. On Monday and Tuesday, June 20–21, Smith and MSK Vice President John Gunn conducted interviews of potential candidates at the HRL Station. Smith and Gunn conducted at least 35 interviews scheduled from 8 a.m. until well into the evening and made no effort to conceal their presence. Many of the interviews were conducted within the breakroom and were frequently interrupted by the presence of Act Fast drivers. All of the six Act Fast employees who had completed and submitted applications by June 20–21 were interviewed. After the interviews Smith and Gunn returned to Dallas, compared notes, conducted further background checks and extended job offers to suitable candidates. By the end of the week of June 20, MSK had hired enough drivers to fulfill all available driver positions and was prepared to operate the new con-

tract. Subsequently Moya forwarded five additional applications to MSK along with his recommendation that they be hired. Although MSK had enough drivers at this point, it was normal for MSK to commence new contracts with more drivers than necessary because of anticipated turnover associated with a new contract. Additionally Moya was the person in charge on the scene as the manager of the DHL station and his recommendations carried great weight with MSK.

Under FAA regulations MSK is required to conduct two full-day hazardous materials (Haz-Mat) training classes for all new drivers. Smith and Gunn conducted these classes for approximately 25 people at a local hotel as the HRL Station did not have sufficient room available for the group. Additionally the VCR at the station was not operational. Training took place after Moya and Maldonado had announced the change and most of the Act Fast drivers had already filled out their applications. On July 5, MSK commenced operations at the HRL station. For reasons unknown to MSK, Moya requested local airport police be present on that day. As was their custom, MSK bought in a transition team of drivers, managers, and trainers to ensure a smooth transition. After 7 to 10 days all new drivers were trained and the contract was operating smoothly. Within 6 months of their start date the station was an efficient successful operation with one of the lowest service error rates in the region.

The Respondent urges in its brief that Hugo Moya and Omar Juarez were not credible witnesses and that they essentially undertook on their own a campaign to ensure that the Union did not attain a majority among the drivers who were to be employed by the Respondent. Respondent points to inconsistencies in an initial statement Moya gave to Respondent's attorney Stephen Key and an initial affidavit Moya gave to the General Counsel to which he subsequently added other information. Moya testified at the hearing that his earlier statement in which he attributed no unlawful actions or improprieties to the Respondent, was given to keep himself out of any involvement with any legal proceedings, particularly in view of an agreement he had signed with DHL in which he had agreed to resign and had received a sum of money and a statement that he had been in good standing in return for his promise not to take any position contrary to that of DHL or to disclose the terms of the agreement. Moya testified that he was concerned about having any further involvement with the matter and wanted to extricate himself from the situation in order that he could pursue other job opportunities without being burdened with an unfavorable job reference. Moya acknowledged having made several antiunion statements and threats to the drivers concerning their support of the Union.

## Analysis

I find that the testimony by Moya was not without confusion but after a thorough review of his testimony and that of Juarez, I find the substantial weight of the evidence supports the testimony of Moya that Juarez had been told by Respondent to only give applications to the "new employees" and that Moya had told Respondent's Managers Gunn and Smith that the two Lopez brothers had voted against the Union and that Gunn had referred to them as good loyal employees. The five employees who had not been employed at the time of the election were covertly given applications by Juarez with the instruction to complete them and not to disclose this to other employees. The only other employee covertly given an application was Ramirez. I conclude that Moya's testimony should be credited as should that of Juarez. It is also supported by the unrebutted testimony of the employee witnesses who were covertly given the applications by Juarez and who were employed by Respondent at the time of their testimony in this case. I do not find it plausible that Moya and Juarez were acting on their own initiative to cause Respondent to hire only the new employees and the Lopez brothers who were deemed to be antiunion. Rather I credit the testimony of Moya and Juarez that the new employees were covertly given the applications as directed by Respondent's management. I do not find credible the testimony of Smith that Respondent was merely accommodating Hugo Moya who had recommended these employees. I also do not credit the testimony of Gunn and Smith that they were prevented from talking to the employees or that they had asked for permission to talk to the Act Fast employees concerning positions with Respondent but had been denied access to the employees by Moya. I credit Maldonado who has no interest in the outcome of this case, that he had talked to both Gunn and Smith and that they had not asked him for access to these employees to discuss positions with them. I credit Moya that he asked Respondent's representatives Gunn and Smith if they wished to meet with the employees during the week of June 28, and that they declined. I further credit the unrebutted testimony of Garcia who testified that following the transition to Respondent, he applied on his own for a position and was asked by then Station Manager Anthony Soto if he was one of the people causing trouble who were outside the facility on the picket line established by the employees, that he told Soto that he was not there on behalf of the other workers but was there only on his own behalf and that Soto told him that his management had told him to watch out for these people. I also credit Garcia's unrebutted testimony that Soto subsequently told him he could not hire him because he was one of the Act Fast drivers.

With respect to the General Counsel's contentions concerning the alleged lack of credibility of Respondent's witnesses Juan Avalos, Jesus Lopez, and Glynn Smith, I credit Avalos' testimony that at a date in June, Moya told him that, "he would take care of it" in an apparent reference to the Union because the couriers were chanting "long live the Union" in the dock area. I note that Moya conceded in his testimony that he may have made some antiunion comments as he was upset that the employees had voted for the Union. I do not however find that this comment is sufficient to support an inference that Moya initiated a scheme to have only the employees deemed unfavorable to the Union to be hired by Respondent. I do not credit Avalos' testimony that he had no prior knowledge that Act Fast was terminating its contract with DHL as David Maldonado credibly testified that he told the supervisors of the change in contractors 2 weeks before he told the drivers. I also find it significant that the date of Avalos' employment application is June 17, which is 11 days prior to June 28, when the drivers were informed of the change in contractors. I do not credit the testimony of Jesus Lopez that he had not spoken to any of his former managers or supervisors about his nonsupport of the Union and his specific denial that he told Maldonado. I credit Maldonado and Moya as well as Gilbert Villegas who testified that the note found in Lopez' vehicle was brought to his attention by Maldonado.

With respect to the testimony of General Manager Glynn Smith, I find in agreement with the General Counsel that his testimony conflicts with Respondent's position statement wherein Respondent stated that Juarez denied having covertly

distributed applications to any Act Fast employees and that Respondent had no reason to doubt his veracity. Smith, who was present in the courtroom, heard the credible testimony of Juarez, Moya, Lorenzo Ramirez and Rosalinda Sierra, that Juarez had covertly distributed applications to Ramirez and Sierra and the testimony of Ramirez and Sierra that they had not filed their applications until June 28, which was the first day when the applications were filed by the discriminatees. Faced with this testimony Smith placed the blame on Moya by testifying that Moya had told him he had a few drivers who would make a good fit. I find this conflict in Respondent's prior position statement to be determinative in discrediting Smith's testimony.

In summary I have considered all of the testimony and exhibits introduced into evidence. I find that notwithstanding inconsistencies in Moya's and Juarez' testimony as well as the position of Respondent that the covert issuance of applications to drivers who were not viewed by Respondent as having supported the Union, was merely the brainchild of Moya and Juarez. I find it unlikely that Moya and Juarez devised this scheme on their own. Certainly there does not appear to be any motivation for them to engage in this conduct. Moreover Moya's and Juarez' testimony is supported in large part by the individual drivers who were the beneficiaries of this covert activity and who were puzzled as to why they had received the applications in such a manner. I do not find the Respondent's training of the new employees at a local hotel to be determinative of any issue in this case.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily refusing to hire employees Edgar Rangel, Jose Muniz, Thomas Vasquez, Rolando Galvan, Gilbert Villegas, Elizondro Martinez, Javier Torres, Michael Guzman and Ernesto Agiular.

4. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## THE REMEDY

Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies and purposes of the Act the appropriate notice. It is recommended that Respondent cease the unlawful refusals to hire found above and offer immediate instatement to employees Edgar Rangel, Jose Muniz, Thomas Vasquez, Rolando Galvan, Gilbert Villegas, Elizandro Martinez, Javier Torres, Michael Guzman, and Ernesto Agiular. The employees shall be instated to their prior positions or to substantially equivalent ones if their prior positions no longer exist. The employees shall be made whole for all loss of backpay and benefits sustained by them as a result of Respondent's unfair labor practices. All of the backpay amounts shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621. Respondent shall recognize and offer to bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

## ORDER

The Respondent, M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discriminatorily refusing to hire employees because of their union membership or support of the Union.

(b) Refusing to recognize and bargain with the Union on behalf of the employees in the following collective-bargaining unit:

> *INCLUDED*: All delivery drivers employed by Act Fast Delivery of Corpus Christi, Inc. at its facility at 3302 Heritage Way in Harlingen, Texas.
>
> *EXCLUDED*: All other employees, including office employees, guards, managers, and supervisors as defined in the National Labor Relations Act.

(c) In any like or related manner interfering with, restraining, or coercing the employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

2. Take the following affirmative actions to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer to hire Edgar Rangel, Jose Muniz, Tomas Vasquez, Rolondo Galvan, Gilbert Villegas, Elizandro Martinez, Javier Torres, Michael Guzman, and Ernesto Aguilar to the positions for which they applied or if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges and make them whole with full backpay and benefits as set out in the remedy, with interest.

(b) Within 14 days of the date of this Order recognize and offer to bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix"[3] at the facility in Harlingen, Texas. Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or the facility involved in these proceedings has been closed, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. June 16, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire employees because of their union membership or their support for Teamster Local Union 657 affiliated with International Brotherhood of Teamsters.

WE WILL NOT refuse to recognize and bargain with the aforesaid Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

*INCLUDED*: All delivery drivers employed by Act Fast Delivery of Corpus Christi, Inc. at the facility at 3302 Heritage Way in Harlingen, Texas.

*EXCLUDED*: All other employees, including office employees, guards, managers, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under the National Labor Relations Act.

WE WILL within 14 days of the date of the Board's Order hire employees Edgar Rangel, Jose Muniz, Tomas Vasquez, Rolondo Galvan, Gilbert Villegas, Elizandro Martinez, Javier Torres, Michael Guzman, and Ernesto Aguilar without prejudice to their seniority or any other rights they would have enjoyed but for the discrimination against them and will make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL within 14 days of the Board's Order recognize and offer to bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

MSK CARGO/KING EXPRESS